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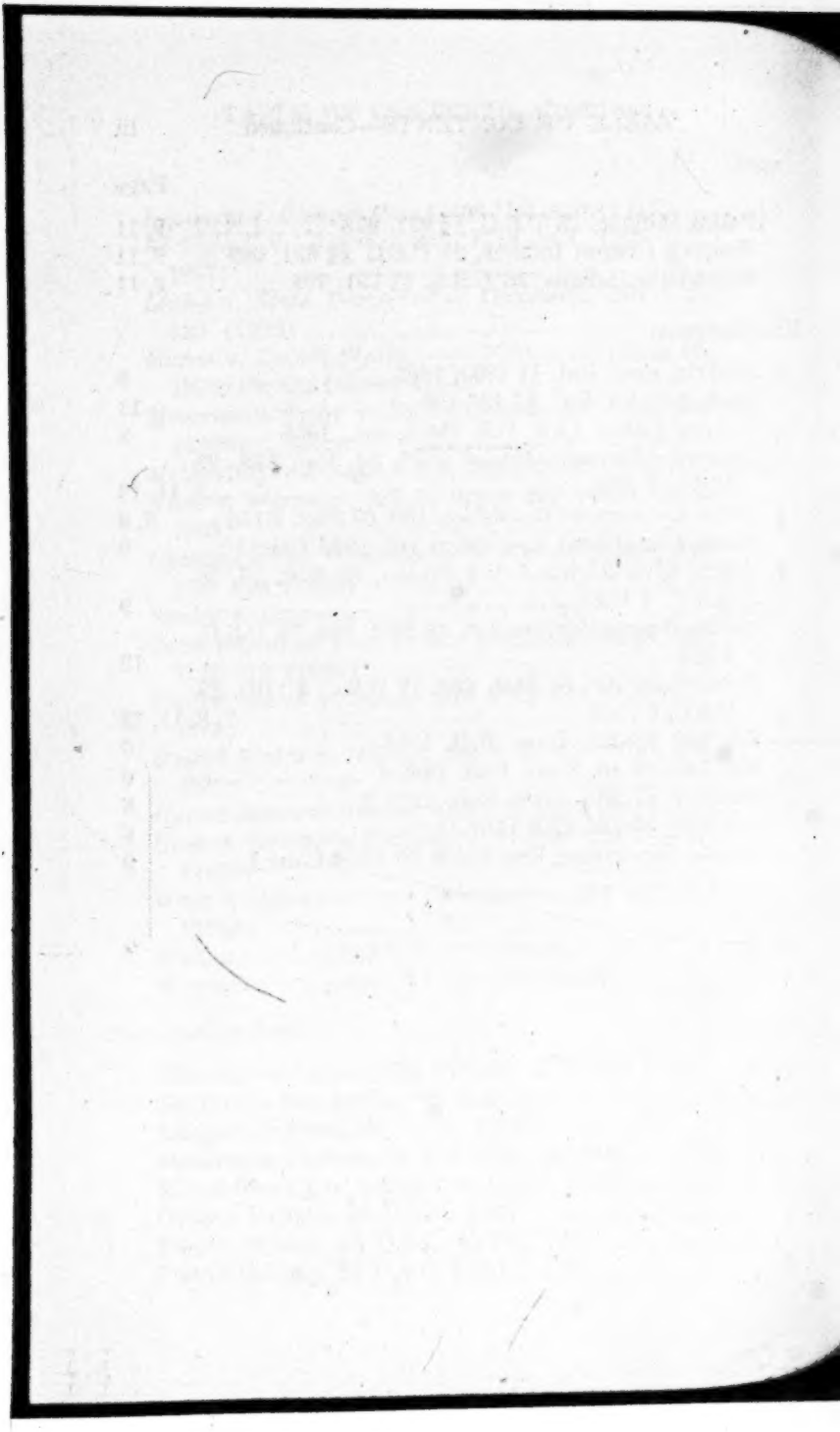

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND MCCLANAHAN,
Appellant,

v.

ARIZONA STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief is filed with the consent of both parties.

Amicus Curiae, the National Congress of American Indians (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes (but not including the Navajo Tribe, appellant's tribe). Its purpose is to promote the in-

terests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the position of the Appellant Navajo Indian, Rosalind McClanahan, and joins her in asserting that the decision of the Arizona Supreme Court was erroneous. NCAI is deeply concerned with the Arizona court's decision, because it represents one more example of a state attempting to extend its jurisdiction over a reservation Indian without the consent of the tribe governing the reservation. It is a flagrant interference with and usurpation of the tribe's governmental powers over its people. It is wrong in every case where the tribe has not consented, and it is illegal in this case because Congress has not consented.

SUMMARY OF ARGUMENT

We believe the Appellant's brief, and the brief filed by the Solicitor General July 19, 1972, cover most of the points ably and correctly. What we have to say herein is intended to supplement what they have said, and hopefully will be helpful to the Court.

In Section I we review the history of the cases in this Court dealing with attempts by states to tax Indians. The early cases involve taxes on property or income from property. Not until recently have taxes on income from an Indian's personal services come into question,[1] but the earlier cases on property taxes are an essential background for approaching the salary tax question.

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[1] Until the instant case, and *Comm'r* v. *Brun*, 286 Minn. 43, 174 N.W. 2d 120 (1970) (rejecting the tax) and *Ghahate* v. *Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002 (1969) (upholding the tax), the only case of which we are aware involving taxes on an Indian's wage or salary is *CIR* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964), upholding the federal income tax on salary of a tribal employee.

In Section II we review the modern history of efforts of Congress to transfer general jurisdiction over Indians to the states.

In Section III we analyze some of the cases relied on by the court below.

ARGUMENT

I. Historical Review of Cases in This Court Reflecting Attempts by States to Tax Indians

One of the earliest cases (if not the earliest case) recognizing an Indian's exemption from state taxes was the 1866 case of *The Kansas Indians*, 72 U.S. 737. In that case this Court held that certain individual Shawnee lands in Kansas, given to them before Kansas became a state, were exempt from state property taxes, because as long as the tribe continued to govern itself as a distinct entity, Kansas had no jurisdiction over the lands, having (like Arizona in the principal case) foresworn such jurisdiction as a condition of its admission into the Union. At p. 756. This Court said:

> "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." At p. 757.

In 1903 this Court in *United States* v. *Rickert*, 188 U.S. 432, held that Sioux trust allotments under the General Allotment Act of 1887 (which provided that the allotments were to be free of incumbrance) were exempt from South Dakota property taxes. This Court relied on two rationales—(1) that the allotment was a federal instrumentality and hence not taxable by the state, and (2) that if the trust property is to be free of incumbrance, it must be free of taxes. Not only was the land

held exempt from state taxes, but horses, cows and wagons on the land as well.

In 1926 this Court held that Oklahoma could not impose an inheritance tax on a Quapaw's restricted allotment, because it was federal instrumentality. *Childers* v. *Beaver*, 270 U.S. 555 (1926). In 1930, this Court held that where a Choctaw allotment was tax exempt under a treaty, Oklahoma could not impose a tax on certain mineral rights associated with the allotment, citing the federal instrumentality rule and Oklahoma's acceptance, upon admission into the Union, of the Indians' tax exempt status. *Carpenter* v. *Shaw*, 280 U.S. 363 (1930).

In the late 1930's and early 1940's, the federal instrumentality doctrine as a basis for exemption from state taxation was severely limited, first with respect to federal employees, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939), and later with respect to Indians, *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943). The latter case allowed an Oklahoma death tax on restricted cash and securities belonging to members of the Five Civilized Tribes, arising from the proceeds of sale of minerals on the Indians' restricted land. Some of the land was concededly exempt from "direct" taxation (presumably property taxes), and this Court refused to allow the death tax on that land. However, this Court upheld the tax on the cash and securities.

The main significance of the *Oklahoma Tax Comm'n* v. *United States* case is that it overruled the prior assumption that Indians were tax exempt under the federal instrumentality doctrine. However, it is important not to read this case as saying that Indians are taxable the same as anyone else. There were good reasons for holding those Indians taxable. This Court noted that the Five Civilized Tribes were not like other tribes; they had "no effective tribal autonomy," and had "little to

distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. Their lands are held in fee, not in trust, as in the *Rickert* case. . . ." At p. 603. Furthermore, Congress had expressly made the minerals themselves "subject to all State and Federal taxes", and therefore, as this Court reasoned, Congress probably did not intend an exemption for the proceeds of their sale. At p. 606.

In 1948 this Court decided *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), another Oklahoma death tax case. Unlike *Oklahoma Tax Comm'n* v. *United States*, this case involved property held by the United States in trust for the Indian, rather than property held by the Indian in fee subject to restrictions, and involved an Indian living on an Indian reservation.[2] The deceased Indian was a restricted Osage Indian, and his property, held in trust by the United States, included his "headright," i.e. a right to share in the proceeds of sale of minerals beneath the Osage Reservation. It was argued, inter alia, (1) that this and certain other property was held in trust by the United States, and therefore it was exempt from state taxation, and (2) that the property was exempt under the federal instrumentality rule. This Court rejected these, saying that *Oklahoma Tax Commission* v. *United States* showed that mere restriction of the property was not the equivalent of tax immunity, and had overruled the federal instrumentality rule. At p. 726.

It is extremely important to note, and the *West* case cannot be properly understood otherwise, that when this Court decided the *West* case, *it was generally assumed*

[2] This Court did not call the Osage reservation a "reservation," but it was and is in fact one, and the Bureau of Indian Affairs shows it as one on its maps (and as the only reservation still left in Oklahoma). As this Court recognized, the reservation was held by the United States in trust for the Osages, and while most of the land was allotted in trust to Indians, the tribe still owns in trust some tribal land and all of the minerals under the reservation.

that Indians were subject to both federal income and federal estate taxes with respect to their restricted and trust property.[3] Today, however, this assumption has been shown to be incorrect, and Indian trust property is exempt from both federal income taxes[4] and federal estate taxes.[5] Consequently, this Court's observation in

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[3] In the *Oklahoma Tax Comm'n* v. *United States* case, this Court, 319 U.S. at 601, said that "the restricted income of Indians was subject to the federal income tax", and observed "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." Page 608 and 608n.12. The brief for the United States on behalf of the Indians in that case expressly agreed that Indian trust property was subject to the federal estate tax. And in the *West* case, the briefs before the Supreme Court showed that the Oklahoma Tax Commission stressed that Osage trust properties were then subject to both federal income taxes and federal estate tax, and West did not dispute this. In 1935, this Court had held that a restricted Creek Indian's income from investment of his trust funds was subject to federal income tax. *Superintendent Five Tribes* v. *Commissioner*, 295 U.S. 418 (1935). Until *Squire* v. *Capoeman*, note 4 below, this was assumed to apply to all Indian income; however, the *Squire* case limited the *Superintendent* ruling to reinvestment income only, and held that income from the basic trust property itself was tax exempt.

[4] *Squire* v. *Capoeman*, 351 U.S. 1 (1956), held that a restricted Indian was exempt from federal capital gains tax on proceeds of sale of trust timber. The cases and the Internal Revenue Service have interpreted this to apply to federal income taxes on all income from trust land, including from farming, grazing, sale of minerals, etc. *United States* v. *Daney*, 370 F.2d 791 (10th Cir. 1966); *Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); Rev.Rul. 56-342, Cum. Bull. 1956-2, 20; and Rev.Rul. 62-16, Cum. Bull. 1962-1; Rev.Rul. 67-284, Cum. Bull. 1967-2, 55; and see also *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957) (California income taxes barred).

[5] *Nash* v. *Wiseman*, 227 F.Supp. 552 (W.D.Okla. 1963); *Asenap* v. *United States*, 283 F.Supp. 566 (W.D.Okla. 1968). In 1967 a case was filed in the Court of Claims on behalf of a deceased restricted Osage Indian, *Beartrack* v. *United States*, Docket 281-67. This case sought refund of federal estate taxes previously collected. In 1968, after trial, the Government capitulated, and the Internal Revenue Service proceeded voluntarily to give refunds to the estates of all deceased restricted Osage Indians. See Rev.Rul. 69-164, IRB 1969-14, 20. Eventually some $4.5 million was refunded.

the *Oklahoma Tax Commission* v. *United States* case (319 U.S. at 608) that "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes" [6] is turned around to exactly the reverse: i.e., if Congress intended to *bar* federal income and death taxes on trust property, as the courts have now established, then a fortiori it can hardly have intended by implication to allow the states to impose such taxes.[7]

As the Court will observe, the above cases deal with state attempts to tax Indian trust or restricted property (or income therefrom), and not with attempts to tax income from the tribal Indian's own labors. With respect to the latter, we will concede that we are aware of no congressional statute expressly or impliedly conferring any tax exemption. Instead, the exemption is found in the general legal status of tribal Indians, which is that, as subjects of semi-independent tribal sovereigns, they are subject to their own laws exclusively, except to the extent that Congress has by statute extended federal jurisdiction to them, or authorized the states to do so. Arizona has no general jurisdiction over the Navajo Reservation, having declined to accept Public Law 280 (see text at note 9 below), nor has Arizona ever been authorized to extend its taxing laws onto the reservation and attach to Indians living thereon. Consequently, the tax in this case is invalid.

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[6] In any case, this is a very dubious syllogism, in light of the emerging consensus on Indian taxation and relationships with states.

[7] The rationale of the *West* case was impliedly overruled by this Court in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), discussed in note 4 above. This overruling has been impliedly recognized by a number of lower court rulings in analogous cases since 1956, and the overruling has been explicitly recognized and fully discussed by the Court of Claims in a recent case involving the same tribe of Indians as in the *West* case. *Mason* v. *United States*, —— F.2d —— (June 16, 1972, Docket 417-70.) The Mason heirs intend to file an amicus brief quoting the Court of Claims opinion.

II. Review of Recent Efforts by Congress to Transfer General Jurisdiction Over Indians to States

Prior to 1953, Indian reservations ordinarily were subject to federal and tribal law exclusively, and state law did not apply to Indians on the reservation.[8]

In 1953 a wave of feeling erupted in Congress to "get out of the Indian business." In that year it passed House Concurrent Resolution 108 (83rd Congress) that it was

> ". . . the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States. . . ." 67 Stat. B132.

In the same year, Congress enacted Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360, extending state law and state court jurisdiction to Indian reservations in California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation). The Act invited other states to extend their civil and criminal jurisdiction to Indian reservations, and to date eight additional states have done so, in whole or in part (Alaska, Florida, Idaho, Montana, Nevada, North Dakota, South Dakota and Washington).[9]

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[8] *Worcester* v. *Georgia*, 31 U.S. 515 (1823); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Kennerly* v. *District Court*, 400 U.S. 423 (1971); U.S. Dept. Int., *Federal Indian Law* (1958); 845-6. However, state law does enter an Indian reservation and apply to non-Indians there. *Draper* v. *United States*, 164 U.S. 240 (1896) (criminal law); *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (1885) (tax law).

[9] Even prior to Public Law 280, a few states had been given certain jurisdiction over Indian reservations by special statute, e.g. in New York and Kansas.

Arizona has not done so, unless certain limited pollution legislation is considered as such.[10]

Another manifestation of Congress' then mood was the so-called "termination" acts. This movement began in 1954 with the termination of federal supervision over six Indian groups.[11] However, problems caused by termination, and Indian and non-Indian opposition, soon caused this movement to peter out.[12]

House Concurrent Resolution 108 is no longer the policy of Congress. Even if it survived the 83d Congress as a viable instrument to express Congress' wishes, which is dubious, the Senate repealed it on December 11 1971 (S. Con. Res. 26, 92d Cong.), and the House is considering repealing it (H. Con. Res. 102, 92d Cong.). Public Law 280 is still on the books, but in 1968 Congress re-enacted it as part of the Indian Civil Rights Act, 82 Stat. 77, and added the fundamental requirement that no state could thereafter extend its jurisdiction to an Indian reservation without the tribe's consent. Section 401(a), 82 Stat. 78, 25 U.S.C. §§ 1321, 1322.

As for the termination movement, no tribe has been terminated since 1962, and the Menominee Tribe is endeavoring to persuade Congress to repeal the Menominee Termination Act. S. 3514 and H.R. 14556, 92d Congress.

President Nixon's message to Congress of July 8, 1970, declared the Administration's position as follows:

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[10] 36 Ariz. Rev. Stat. § 1801, 1865. As the Govt's brief points out, p. 15n.5, an unanswered question is whether a state may validly accept only partial jurisdiction under Public Law 280.

[11] Klamath Indians, 25 U.S.C. § 564; Mixed-Blood Ute Indians, 25 U.S.C. § 677; Western Oregon Indians, 25 U.S.C. § 691; Alabama and Coushatta Indians, 25 U.S.C. § 721; Paiute Indians, 25 U.S.C. § 741; Menominee Indians, 25 U.S.C. § 891.

[12] The Wyandotte and Ottawa Indians were terminated in 1956, 25 U.S.C. §§ 791 and 841, and the Peoria Indians and some California rancherias were terminated in 1958, 25 U.S.C. § 821, and 72 Stat. 619. Since then the only termination act has involved the Ponca Indians, 25 U.S.C. § 971 (1962).

"This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

"This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American."

Some of the same reasoning applies to transfer of jurisdiction to the states without the consent of the tribes, which amounts to partial termination of tribal self-government, and which was possible under Public Law 280 until it was amended in 1968.

We recite all of this background to show the Court what resistance Indians and others have made to the

extension of state jurisdiction over Indian reservations, and the traditional explicitness with which Congress has acted, when it has acted at all.[13] It is totally inconsistent with this historical background and the cases to permit Arizona's taxing power to enter the Navajo Reservation and attach to Indian income or property there.

The termination acts, incidentally, support the assumption that tribal members are not subject to state taxes prior to termination.[14] For example, the Klamath Termination Act, 25 U.S.C. § 564j, provides that after property is distributed to the Indians,

> ". . . such property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians. . . ."

Other termination acts have similar provisions.[15] Under the *Capoeman* rationale, this would seem to imply tax exemption for unterminated tribes.[16]

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[13] For example, as noted in Appellant's brief, p. 25, Congress has aside from Public Law 280 authorized states to extend their taxing power into federal areas, but Indians are exempted from this. Buck Act, 4 U.S.C. §§ 105-109.

[14] Even in the case of a terminated tribe, the tribe may retain certain immunities from state law. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

[15] Mixed-Blood Ute Termination Act, 25 U.S.C. § 677p; Western Oregon Termination Act, 25 U.S.C. § 699; Paiute Termination Act, 25 U.S.C. § 749; Wyandotte Termination Act, 25 U.S.C. § 798; Menominee Termination Act, 25 U.S.C. § 898; Ponca Termination Act, 25 U.S.C. § 978, and California Rancheria Termination Act, 72 Stat. 619, § 2(d).

[16] See *Squire* v. *Capoeman*, 351 U.S. 1 (1956), where one of the important reasons for the Court's decision was the fact that the 1906 amendment to the General Allotment Act provided that upon termination of the trust period, "all restrictions as to . . . taxation of said land shall be removed . . . ." This Court said this implied that prior to such termination, the land was to be free of all taxes. 351 U.S. at p. 8.

III. Analysis of the Cases Relied on Below

The court below (Juris. St. p. 4a) relied on *Leahy* v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936), as upholding a state income tax on the headright income of an Osage Indian. But that case involved an *unrestricted* Indian, who had received a certificate of competency. Therefore, under the applicable Osage statutes, as earlier interpreted by this Court, *Choteau* v. *Burnet*, 283 U.S. 691 (1931) (and still good law), Leahy was as subject to state income tax on his headright income as a non-Indian. Had Leahy been a *restricted* Osage, his headright income would not have been subject to federal tax,[17] and a fortiori not state tax either.

The court below (Juris. St. p. 4a) also relied on *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), where this Court allowed a state death tax on restricted Indian property. But that case does not support the decision below, because that case did not involve an Indian reservation. There the Indians owned their land in fee, subject only to certain restrictions on alienation. They lived in an Indian community, perhaps, but the reservation had long since been abolished, and the state had complete general jurisdiction over the area where the Indians and their property were located. Arizona, in contrast, does not have general jurisdiction over the Navajo Reservation.

The court below (Juris. St. p. 5a) also relied on *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962), where state fish trap laws were held to apply to Indians on a reservation in Alaska. But that reservation was a highly special one. Not only were these Indians immigrants from Canada, but this Court noted that they had "very substantially" adopted and been adopted by the white

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[17] *Big Eagle* v. *United States*, 300 F.2d 765 (Ct.Cl. 1962); *Blackbird* v. *CIR*, 38 F.2d 976 (10th Cir. 1930).

man's civilization, and "were never in the hostile and isolated position of many tribes in other states," at pp. 50-51, and that "there was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other states, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation." At p. 51.[18] Previous cases had applied Alaska territorial (not federal) laws to the Metlakatla Reservation. At pp. 51-52. Public Law 280 applied there. At p. 56. The Reservation was further unique in that the Secretary of the Interior was given regulatory power over it. At p. 53. Because of this latter power, and the uncertainty whether the Secretary had exercised it so as to exempt the Indians from the state fish trap law, the case was remanded.

We agree that the *Metlakatla* opinion supports the application of state law to Indians on an Indian reservation. However, that opinion is self-distinguishing by its emphasis on the uniqueness of that reservation and the de facto assimilation of the Indian residents. The principle should not be extended to a reservation where the

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[18] We seriously question the accuracy of the implication that reservations in the continental U.S. were for the protection of the settlers. It is our understanding that protection of settlers was not a common motive at all, especially not after the mid-1800's. We believe the common motive was to shrink the tribal jurisdiction and make land available to the settlers. After 1887, with the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331ff, Congress began the long and generally unsuccessful effort to break up the reservations and assimilate the Indians. This was finally abandoned in 1934 with the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461ff, which laid the foundation for piecing the tattered reservations back together again and breathing new life into tribal governments. As detailed in the preceding section, there was a flurry of "termination" fever in the 1950s, but that did not take root, and the present course of events today is strongly proceeding down the path of tribal self-government and strengthening of the reservations and their governments.

Indian residents remain a distinct, self-governing community, and have not assimilated into the local white society.

The court below also mentioned *Kake Village* v. *Egan*, 369 U.S. 60 (1962), a companion case to *Metlakatla*. But as the court noted, there was no reservation in *Kake*, and so the case is not helpful.

The lower court believed that the question was whether the state income tax would infringe "on the right of the Reservation Indians to make their own laws and be ruled by them." Jurisd. St. p. 4a, quoting *Williams* v. *Lee*, 358 U.S. 217 (1959). *Williams* does say this, but also said, more generally and more accurately, that

> "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220.

We agree with Appellant that the test whether state laws infringe on the right of Indian self-government is a test that comes into force once it has been determined that state laws apply at all to the Indians on a reservation, something which is not true of the Navajo Reservation.

CONCLUSION

The State of Arizona can point to neither an act of Congress nor a decision of this Court, nor of any federal court, authorizing it to impose its general income taxes on Indians residing within an Indian reservation. Consequently, the Navajos residing on their reservation are not subject to Arizona income taxes. The judgment below should be reversed.

Respectfully submitted,

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Of Counsel

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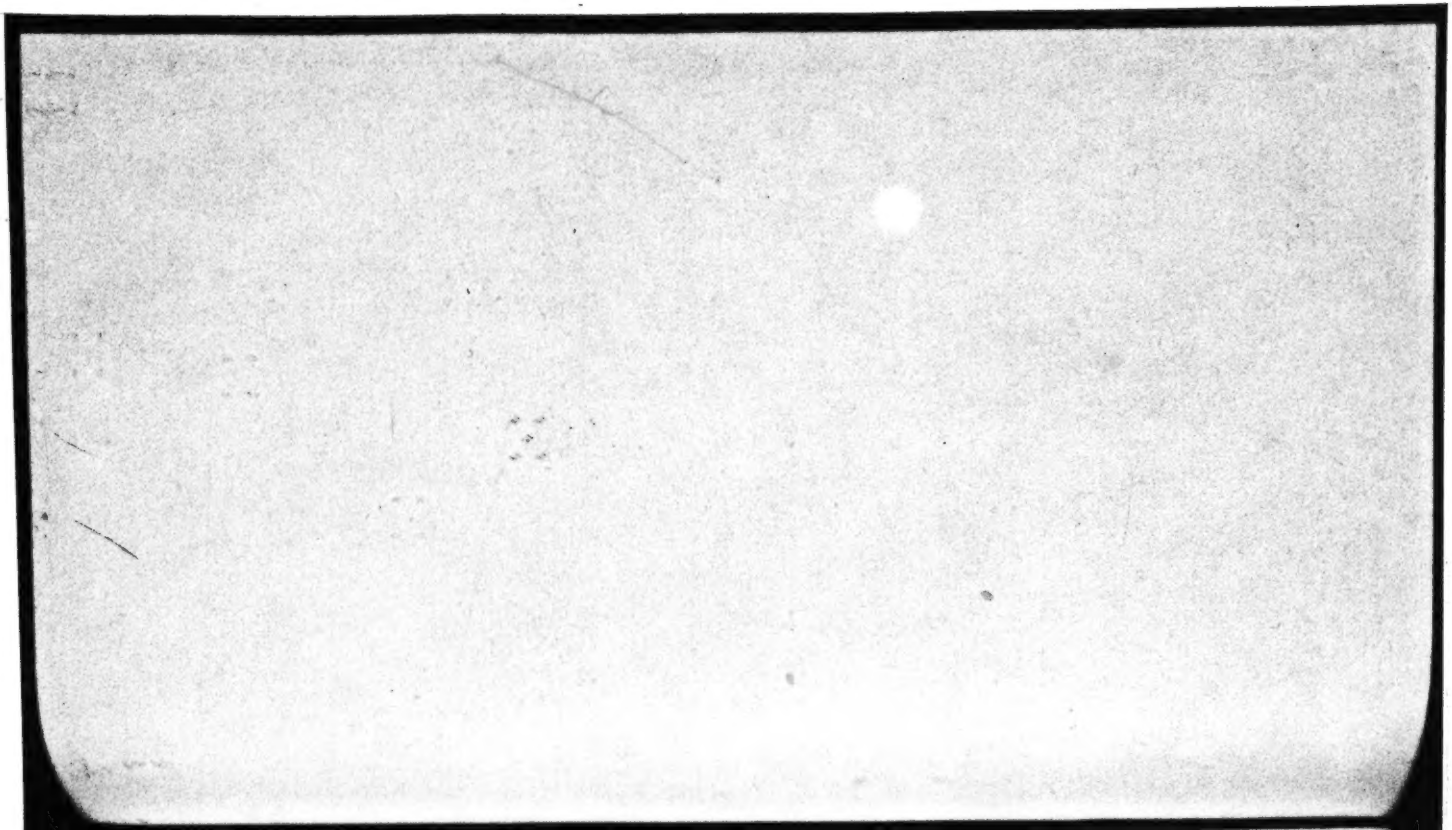

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